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IN THE

Supreme Court of the United States

October Term, 1966

No. 593

FRANCES KAHN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF TO OPPOSING BRIEF FOR THE UNITED STATES ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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We would not ordinarily encumber this Court with a reply brief, however we note an extraordinary admission in the Government's opposing brief that had not come to any Court's attention before. We wish to spotlight this issue to the Court for it now raises a whole complex of issues concerning the administration of criminal justice in the federal Courts and the constitutional rights of all defendants. The Government admits for the first time that the eavesdropping tapes between petitioner and her client at the Westchester County Jail were used before the Grand Jury in this case (G. Brief, p. 9). Petitioner has steadfastly proclaimed that the eavesdropping tapes were unconstitutionally and illegally obtained and presented to the Grand Jury in order to indict petitioner (Petition for Certiorari pp. 14 and 28). The Government has conceded

that eavesdropping tapes were played for the benefit of the Grand Jury and with commendable candor, when the Government does not deny the tapes were used to obtain the indictment but instead thereof states (p. 9 *id.*):

> "Even assuming, *arguendo,* that *the recordings were incompetent evidence,* petitioners, who had access to the transcripts of the grand jury testimony of Charles and Patricia Hedges, have not shown that there was no relevant or competent evidence upon which to sustain the indictment. (Emphasis supplied.)

The Government could have flatly denied the tapes were used before the Grand Jury however, the Government takes the position that although the tapes were used they are nevertheless admissible before the Grand Jury because there was other evidence before the body of Grand Jurors which was competent, such as Charles & Patricia Hedges. The Government cites the *Costello* case, 350 U. S. 359; the *Lawn* case, 355 U. S. 339 and *Cochran* v. *United States,* 310 F. 2d 585, 590 (C. A. 8) as cases in point (G. p. 9). The *Costello* case was not meant nor intended to import any illegal and unconstitutional material to reach an indictment. The *Costello* case does not stand for the immunization of illegal and/or unconstitutional evidence just so long as other competent evidence is presented to the Grand Jury. The Government has again taken this Court's decision such as in *Costello, supra,* and is trying to create a total blackout to the Court by saying in effect that Courts are no longer permitted to look into any evidence imported into the Grand Jury room by the prosecution. No federal prosecutor worth his salt would take wiretap or eavesdrop evidence into a Grand Jury body and breathe life into such unconstitutionally or illegally obtained evidence by simply placing any witness before that body except if this Court would deny certiorari herein.

The dangers thereby would be terrible and would certainly wreak havoc to the protections afforded to defendants pursuant to Title 47, §605 of the Federal Communications Act; and the constitutional guarantees mandated by the Fourth, Fifth and Ninth Amendments to the United States Constitution. The Grand Jury convened on at least two occasions to hear Charles Hedges and his wife Patricia. Who can safely state that the Grand Jurors believed that pair without later listening to selected portions of the eavesdrop tape recordings. Who can state with certainty that the Grand Jurors would have found an indictment against petitioner unless the prosecution and/or Federal Bureau of Narcotics Agent Thomas J. Dugan were compelled to utilize some of the eavesdropping tapes existing between petitioner and Charles Hedges. Surely there was no supervision of how much of the eavesdropping tapes were played before the Grand Jury prior to the vote of the indictment and subsequent to the testimony of the Hedges pair.

Here we have an overriding policy of eavesdropping. Conspiracy charges without corroboration could have indicted petitioner except for the assumption that the Grand Jury elected to reject the Hedges' testimony against petitioner, a lawyer. This rejection compelled the prosecution to resort to the playing of the eavesdropping tapes before the Grand Jury. The prosecution did everything in its power to avoid admitting that there were certain portions or any portions of tapes which were presented to the Grand Jury in order to have an indictment returned against petitioner. We respectfully submit that the importation of these tapes for the benefit of the Grand Jury simultaneously concealing it from the Courts below and from petitioner must be stopped at its roots by dismissing the indictment so obtained. There are other considerations such as ruining a lawyer forever despite the fact she is entirely

innocent of any part of the alleged conspiracy; the finding of an indictment of conspiracy may well be used as a lever to obtain a plea from a co-defendant and guarantee him freedom in return for his testimony against petitioner. The record reflects that co-petitioner Schawartzberg stated he was propositioned by the prosecution to incriminate petitioner, and co-petitioner Pacelli was visited by federal agents at the direction of the prosecution during his stay at West Street Federal Prison in New York City upon his return from Atlanta to New York City to plead not guilty to the instant indictment.

The reckless disregard of petitioner's constitutional rights on the part of the prosecution to bring the eavesdrop tapes to be played before the Grand Jury compelled the Grand Jurors to believe the Hedges' concocted story despite the Grand Jurors' previous disbelief in the Hedges' tale of conspiracy and the substantive charges. Lawyers throughout the country will be at the mercy of the prosecutors and purported clients if the decision of the Court below is permitted to stand. We respectfully implore this Court to exercise its supervisory powers and to stop this great danger at the root. The acts of the prosecution before the Grand Jury is not a full curtain to look at and render this Court helpless to eradicate this evil.

The case at bar is readily distinguishable from the *Costello* case, *supra*. Eavesdropping tapes in part or in full do not rise to the level of hearsay evidence. In *Costello,* it was a "net worth" case with a sole defendant with hearsay testimony of three federal agents. The Grand Jury in the *Costello* case listened to three federal agents and accepted their testimony as competent although it was hearsay. In the instant case the Grand Jurors heard from Mr. & Mrs. Hedges who had their own reasons to incriminate petitioner in return for the ten year reduc-

tion of sentence which reduction the Government took credit after petitioner had obtained such reduction pursuant to suggestion by the sentencing Court in Connecticut (Timbers, *J.*). Notwithstanding the evidence of the Hedges to the Grand Jury in this case the prosecution brought the eavesdrop tapes before that body in its efforts to indict petitioner and to rehabilitate the rejected testimony of the Hedges.

The *Lawn* case cited by the Government, 355 U. S. 339 (1957) is also inapposite to the instant case. In the case at bar we have a situation where the eavesdropping tapes were utilized in the presence of the Grand Jury in order to obtain an indictment which otherwise would have been unobtainable and the prosecution then suppressed that fact from the pre-trial and trial Judges and the defendants. The prosecutor in his affidavit in opposition to petitioner's inquiry concerning the use of the tapes before the Grand Jury swore that petitioner's contention *"is totally without* merit" (Emphasis added).

In *Cochran* v. *United States,* 310 F. 2d 585 (8 Cir. 1962), that case is inapposite to the case at bar in that the Trial Judge failed and refused to inspect the Grand Jury minutes to determine whether eavesdrop tapes were played for their ears while in *Cochran, supra,* the District Judge examined the Grand Jury file and found the indictment proper on its face.

Obviously the statement by the Government at page 9 of their brief permits of only one construction: that the Government did use the eavesdropping tapes or selected parts therefrom in the Grand Jury room and obtained this indictment. Petitioner challenged the indictment on such grounds prior to trial but the motion to inspect was denied without the Court so much as reviewing the evidence presented to the Grand Jury. First this Court had the case

of *Black* v. *United States* (decided today), come all the way to this Court and after denial of the petition for the writ of certiorari it was learned by *Black* that his hotel room conversations between him and his attorney had been bugged. The Solicitor General filed a memorandum in May of 1966 admitting that (P. "2" of said Memorandum):

> "However, the listening device was in operation from approximately two months before until approximately one month after the evidence was presented to the grand jury and the indictment was returned."

The Solicitor General continued (at p. "4" thereof):

> "The Department of Justice's investigation of this incident indicates that none of the evidence presented to the grand jury or used at petitioner's trial was obtained, either directly or indirectly, from any improper source."

The memorandum of the Solicitor General concluded that this Court should consider *Black's* petition for rehearing and if denied it should be denied "without prejudice to a further hearing on appropriate motion in the district court." Alternatively, the Solicitor General suggested (p. "5" *id.*):

> "This Court could issue a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the district court for further proceedings . . ."

In the *Black* case, *supra,* he charged that his trial was tainted by F.B.I. wire tapping and by the placing of an "eavesdropping device" in his hotel suite. We need merely consider the following excerpts of the pre-trial motions of petitioner and co-petitioner Schawartzberg and the affidavit of the then prosecutor, Howard L. Jacobs, Esq., and it will

reveal the prosecution in the district Court wilfully and deliberately concealed from petitioners and the district Court that eavesdropping tapes of client Charles Hedges, chief Government witness, and petitioner, the said client's attorney, were used before the Grand Jury to secure the indictment. Of course, petitioner's case is on as good ground as *Black*. Now we have this case come as far as it did before this tribunal, when we now learn that eavesdrop evidence was used in the Grand Jury room to obtain the indictment, to wit:

a) Petitioner's pre-trial Notice of Motion to dismiss the instant indictment (11-20),* *inter alia,* at paragraph "12" on page "4" thereof sought an order "directing a dismissal of this indictment on the ground that the Federal Grand Jury which heard the evidence presented herein, were not afforded the opportunity to listen to each and every single tape recording taken in Westchester County Jail, all of which is a suppression of material evidence on the part of the prosecution which would have been favorable to the accused and which would have prevented the finding and return of this indictment."

b) The prosecutor's answer thereto is set forth in his opposing affidavit (69-76)* at paragraph "22" thereof which avers: "Kahn Item 12 seeks a dismissal of the indictment on the grounds that the grand jury did not hear all of the tapes. This is totally without merit."

c) Petitioner's pre-trial Notice of Motion, *supra,* paragraph "18," Item "o" also requested a bill of particulars whether any eavesdropping orders were obtained against petitioner "* * *" and whether it was presented to the Grand Jury." The prosecution refused to disclose it as appears from their affidavit at paragraph "32."

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*Refers to pages of Index to Record on Appeal in Court of Appeals.

d) In co-petitioner Schawartzberg's pre-trial Notice of Motion requesting a bill of particulars (21-44)* he wrote at page "9," Item "xvii" thereof: "State whether the Grand Jury listened to each and every electronic recording now in possession of the prosecution as pertaining to Charles Hedges and Frances Kahn." The Government refused to furnish the desired bill of particulars and simply evaded the issue.

From all of the foregoing, the prosecution succeeded in hoodwinking the pre-trial motion Court and the trial Court and the defendants in this case. Now that the Solicitor General refuses to be a party to this deception which was practiced by the prosecution in the District Court and on appeal to the Court of Appeals for the Second Circuit this Court's supervisory powers over the administration of federal criminal justice should be exercised herein.

The Government seeks to justify the use of the eavesdropping tapes before the Grand Jury by citing the *Costello* case, *supra*. The *Costello* decision could not have meant to license the importation of any unconstitutionally obtained evidence before a Grand Jury such as wiretap and/or electronic eavesdrop evidence in order to obtain an indictment. It is time for this Court to stop this distorted construction on the part of the overzealous prosecutors. It is no answer that these tapes were not played for the trial jurors' ears. Had these tapes not been made available for the Grand Jury's consideration it is more than likely that petitioner would not have been compelled to be tried since there would not have been any indictment found against her by the Grand Jury. The tapes consumed about four hours of listening time and it is reasonable to assume the prosecution hand-picked certain parts of these recordings to be played for the Grand Jury's benefit so as to magnify

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* References are to pages of the Index to Record on Appeal in Court of Appeals.

the Hedges' testimony out of proportion which resulted in the finding of the instant indictment.

There is no proof in the case that electronic eavesdropping surveillance upon client Charles Hedges, during his prison interviews by his wife and family, but the monitoring of his conversations in jail by the authorities could conceivably have forced Hedges to manufacture the tale against petitioner. We respectfully submit there is not an iota of incriminating evidence of any crime on these tapes concerning petitioner. After the alleged bribe offer was purportedly made to Charles Hedges by petitioner, the Government decided to strap an elctronic device on Hedges' person in order to obtain the proof. When the recorded eavesdropping tapes failed to support Hedges' contention of a supposed offer of a bribe, petitioner ought not have been arrested and indicted. The tapes clearly showed Hedges created a story for the tapes were shown to be negative. The prosecution represented to the Trial Court it would use the tapes on the trial but they refused and failed to do so. Of course, the tapes showed Hedges and his wife to have concocted their story.

The prosecution did everything in its power to mechanically "'reclarify" the tapes but due to co-petitioner Schawartzberg's supervision over these tapes by order of District Judges Tenney and Sugarman respectively, the Government abandoned its use before the trial jury. However, since the tapes were presented to the Grand Jury and in light of the questioning of petitioner by the Government which developed that Hedges had mentioned to petitioner someone had once brought him an offer of $25,000 not to testify against defendants in a narcotic conspiracy trial where he was the key witness, the Government elected not to play the tapes for the trial jury's consideration. Hedges tried his utmost to bait petitioner by telling her of the bribe offer. Petitioner advised Hedges to reject any such

offer, and the tapes support her. If Hedges' cousin, James Godwin (another special employee for the Government in another case docketed as No. 527 by co-petitioner Pacelli before this Court), had not apprised the defense of the contemplated "reclarification" of the tapes then the tapes would have been edited to incriminate petitioner. Under the doctrine of *Walder* v. *United States*, 347 U. S. 62 (1953) the prosecution could have used the tapes to rebut petitioner's trial testimony but they chose not to do so for they had obtained the conversation which had ensued as respecting the unknown bribe offerer.

Government witness Charles Hedges shocked the entire Courtroom when he testified that petitioner had stated to him he could have the $25,000 brought to him in cash during his confinement at the Westchester County Jail (90a).* Instead of wiring up Hedges all the Government had to do was to arrange with Hedges to have petitioner bring in the alleged $25,000 to him at the jail and they could then have arrested petitioner without any difficulty. This type of arrest would have been good police work as the monies would have been the best proof of a bribe offer. Criminal justice is not an equal game between two sides with the life or liberty of the prisoner as the stake. Unfortunately, petitioner is and has been physically handicapped since the age of three due to polio and after an arduous struggle to ascend to the practice of law it has taken a prosecution by three men (two of whom have resigned to enter private practice) to try to deprive petitioner of her life's work.

Prior to trial petitioners moved the District Court for an order to suppress the recorded eavesdropping tapes and its fruits. On oral argument the Civil Liberties Union of New York appeared in petitioner's behalf and argued that a counsel room in a jail assigned for that purpose is

* Reference is to page of Appellant's Joint Appendix.

an extension of an attorney's office (522-535)* and that while the privilege belongs to the client he cannot ostensibly be a client while practicing a deception upon his attorney that he is a client. Although the motion to suppress was denied the Government did not use the tapes at trial. The decision by the District Court denying the suppression thereof now permits the prosecution *carte blanche* to carry the ball over the goal line in all attorney-client conferences and this ought to be stopped now in the vast interest of the legal profession even though the prosecution purposely refrained from using the eavesdrop tapes before the trial jury.

In a recent decision unreported to date (NYLJ October 21, 1966, p. 1) the District of Columbia Circuit reversed the conviction of *Gregory* v. *United States,* decided July 28, 1966, and Judge Wright speaking for the majority said:

> "The court required defense counsel to request, receive and read the Jencks Act statements in the presence of the jury."

The same situation prevailed in the instant case as *Gregory, supra.* When defense counsel requested the Jencks Act statements relating to the witness' testimony at the close of the direct testimony he was immediately advised he would have to make the request in open Court in the presence of the jury. *Gregory's* counsel protested that just one week before the District of Columbia Circuit had handed down its opinion in *Johnson* v. *United States,* 347 F. 2d 803, 806 (1965) but the trial Judge stated he was familiar with the *Johnson* case but that he would not follow the procedure there indicated because in the trial

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* Refers to pages of the Index to the Record on Appeal before the Court of Appeals.

Court's judgment it was dictum. The Court, in reversing the judgment wrote as follows:

> "It is familiar law that prior consistent statements are not admissible in evidence, and consequently it is improper to require a procedure, in exercising Jencks Act rights, to require defense counsel to request and receive Jencks Act statements in the presence of the jury."

In petitioner's case objection was made by petitioner's counsel and by co-petitioner Schawartzberg regarding the turning over of the Jencks Act statements in the jury's presence. In view of the conflict in the production of the Jencks Act material in the jury's presence under the Jencks decision as reaffirmed by Congress in the Jencks Act, petitioner urges this Court to exercise its power to supervise the administration of justice in federal Courts and to establish a rule that motions for the production of Jencks Act statements should be made with the jury absent or unaware in order to avoid the undue prejudice which may arise from the jury's knowledge that Jencks Act statements were available to the accused.

The legislative history of Section 3500 of Title 18, United States Code, makes clear that the statute's provisions are not discretionary.

> "The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned . . . the proposed legislation . . . reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testi-

fied at trial . . . " 1957 U.S. Code Cong. & Admin. News 1862.

The only decision to be made by the trial Court is the decision as to relevance. Once relevancy is determined, production is commanded.

There is no doubt that the statement sought was a statement previously made by Government witness Patricia Hedges concerning her direct testimony. Nor is there doubt that the Government had constructive, if not actual possession of the statement, that it was available and in court during trial, and that the prosecutor had been made aware of the contents by Agent Miller. In the progenitor of Section 3500 of Title 18, United States Code, this Court, citing *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944) approvingly concluded:

> "in criminal causes ' . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . .' " *Jencks* v. *United States*, 353 U. S. 657 (1957), 671.

The Government's obligation under Section 3500 of Title 18, United States Code, should be more clearly defined by this Court.

Petitioner maintains that use of the recording devices at the Westchester County Jail and use of the tapes at the Grand Jury session was highly improper; petitioner attacked the truth of the recordings notwithstanding the fact

that they were exculpatory for the tapes were tainted, indiscernible in large part and were reclarified and the seal broken contrary to the Court's order; the Government and client Hedges practiced a deception upon petitioner by leading her to believe he was her client; created legal work for petitioner and consistently requested her to come to the jail and to bring his wife there and the Government then asserts that the petitioner made numerous visits to Hedges; the client sought out petitioner to tell her of a purported bribe offer to him, which she advised him to reject; petitioner didn't bring Hedges an offer of any kind of bribe; the vouchers will show that Hedges was compensated with a large sum of money in return for his testifying against petitioner; the Fourth Amendment extends to the counsel room of the jail and the tapes were unconstitutionally obtained and used by divulging the contents thereof to a Grand Jury.

This was a short trial, not a long one, which consumed about eight days less the time that the jury went home early to allow defendants an opportunity to examine the vast amount of Jencks Act material. The jury deliberated approximately thirty-six hours after the case was given to them. Charles Hedges could not have taken the privilege after he had already waived such privilege and the statute had run. He was a key witness against petitioner. He was not questioned about collateral matters. He was asked directly whether he had in fact committed certain hold-ups; not as to whom he had participated with or any of the plans leading to and following the robberies in question. These answers would have weighed heavily against Charles Hedges as to his credibility for the Government was not apprised of the commission of these robberies by the key witness himself. The Government permitted Hedges to invoke the Fifth Amendment even after it was

shown the statute had run. Besides, petitioner's mouth was wrongfully sealed by the Trial Judge and she was therefor unable to explain away the reasons for the visits and was unable to assail the key witness who had been instrumental in causing the indictment of petitioner.

Wigmore on Evidence, 8, McNaughton rev. 1961, §2328, subd. 6 recites in pertinent part: When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue. Here are some Federal cases on the subject. *Olmstead* v. *Webb,* 5 App. D. C. 38, 51 (1894) (attorney for deceased client admissible where his representatives charge the attorney with misconduct; "The object of the rule ceases, and the attorney is no longer bound by his obligation, when the client or his representatives charge him, either directly or indirectly, with fraud or other improper or unprofessional misconduct"); *Popovitch* v. *Kasperlik,* 70 F. Supp. 376, 381 (W. D. Pa. 1947) ("[W]hen the question of the integrity of a reputable member of the bar arises, the attorney should be entitled to explain the circumstances, since for him to keep silent would justify inferences being drawn that some act or deed was committed on his part that was not legal or in accordance with the direction of his client").

The Government has propositioned co-petitioner Schawartzberg as far back as June, 1962 to incriminate petitioner which stands undenied in this record. The indictment was returned against petitioners only after co-petitioner Schawartzberg had demanded his own arrest or dismissal of the rumors of indictment in November, 1965. He accused the Government of being a modern Javert and demanded a speedy trial. A recent case in the Ninth Circuit Court of Appeals, *Lenske* v. *United States,* decided October 5th, 1966, resulted in a reversal of the judgment

in a tax prosecution (U. S. Law Week, 11/1/66, 35 LW 2227) wherein the majority of the Bench stated in language appropriate here:

> "We reverse. This court will not place its stamp of approval upon a *witch-hunt,* a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. *This court will not be so used.*" (Emphasis ours.)

In the light that the Government was conducting a "witch-hunt" as to petitioner and took their time in arresting her, the unreasonable pre-arrest delay constituted a violation of "due process." The recent law reviews pertaining to constitutional law on pre-arrest delays may be found in the following:

a) New York University Law Review, Vol. 41, p. 638, May 1966 issue;

b) Iowa Law Review, Vol. 51, p. 670, 1966 issue;

c) Minnesota Law Review, Vol. 50, p. 970, 1966 issue.

It is apparent that the case of *Ross* v. *United States,* 349 F. 2d 210 (D. C. Cir. 1965) impelled the law reviews cited hereinabove. In petitioner's case her constitutional right to a speedy trial and "due process" of law was denied by the pre-arrest delay.

Petitioner does not agree with the learned jurist (Moore, *J.*) of the Second Circuit, who wrote the opinion in this case, when Judge Moore termed this great Court a rubber stamp, speaking as a panelist on Pre-Trial Discovery in Criminal Cases, Brooklyn Law Review, Vol. 31, p. 334, he said (re *Jackson* v. *Denno,* 378 U. S. 368):

"I wrote it with the Supreme Court in mind so that they could be saved some work, with all the other things they have to do, like FELA and reapportionment cases, I thought it was but fair to give them something so that they could, in fairness to the defendant—because, after all, that's our business—they could just rubber stamp my opinion. They did, but they rubber-stamped it with their rubber stamp of "reversed." They carry both kinds of stamps down there."

CONCLUSION

For the foregoing reasons in the reply brief and for the reasons set forth in her petition for a writ of certiorari, it is respectfully submitted that the petition for certiorari should be granted and we urge this Court to exercise its supervisory powers over the administration of federal criminal justice.

Dated: November 7, 1966.

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